

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers	)	
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications Act of	)	CC Docket No. 96-98
1996	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

**REPLY COMMENTS OF CATENA NETWORKS, INC.**

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## SUMMARY

In its initial comments in this proceeding, Catena explained that uncertainty and the threat of unbundling (and then re-bundling) at non-compensatory prices that are based on hypothetical, incremental costs is stifling investment by the ILECs in advanced services technology. Catena attested to the fact that these disincentives are not mere posturing by the ILECs – investment in Catena’s technology, which can provide DSL service to customers in rural and suburban areas served by certain legacy remote terminals, has not expanded as quickly as it could, notwithstanding its proven economic and technical capabilities.

Catena thus urged the Commission to act quickly to resolve the outstanding interrelated rulemaking proceedings to develop a cohesive broadband policy that does not create disincentives (such as unworkable access and pricing) for investment in new broadband technologies. Catena also urged the Commission to act even faster to resolve discrete remote terminal collocation issues that are fully ripe for decision so as to remove any potential impediments to the deployment of integrated broadband technology. Finally, Catena urged the Commission not to allow inconsistent state regulatory decisions to frustrate the critical federal policy of fostering the rapid deployment of broadband services. The initial comments filed in this proceeding, as well as the Court of Appeals decision remanding the Commission’s UNE decision, all reinforce the need to take these actions recommended by Catena.

In the initial comments, there was no renewed call for line card collocation. Indeed the opponents of such a requirement demonstrated again why such a requirement would be inefficient and impractical. The record also reinforces the need for expedition,

because State regulatory decisions (or threats of such action) are creating a patchwork of regulatory obligations and stifling the deployment of new broadband technologies.

The record also now makes clear the need to eliminate the current disincentives for new broadband investment caused by unbundling at TELRIC prices. The manufacturing industry is unanimous in its support for not imposing such obligations on new last mile facilities deployed by the ILECs, and Catena fully supports such a standard. Finally, Catena believes that the Court of Appeals decision should not cause the Commission to veer away from the path it has selected or slow down its attainment of the goals, because the Court is merely requiring the Commission to consider the factors it has already indicated it would examine.

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**REPLY COMMENTS OF CATENA NETWORKS, INC.**

Catena Networks, Inc. (“Catena”), a manufacturer of technology that provides broadband access using wireline facilities, hereby files reply comments in this Commission proceeding re-examining the unbundling obligations of the Incumbent Local Exchange Carriers (“ILECs”).<sup>1</sup> Catena has a strong interest in having the Commission eliminate the current investment disincentives to deployment of broadband equipment, and thus participated in earlier phases of this proceeding. As Catena explained in its initial comments, uncertainty and the threat of unbundling (and then re-bundling) at non-

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<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 01-361, released December 20, 2001 (hereafter “*Notice*”). The Commission extended the reply comment deadline in light of the Court of Appeals decision (*USTA v. FCC*, 2002 WL 1040574 (DC Cir)) remanding the Commission’s earlier *UNE Remand Order* and vacating the Commission’s *Line Sharing Order*. *Public Notice*, DA 02-1284, released May 29, 2002.

compensatory prices that are based on hypothetical, incremental costs is stifling investment by the ILECs in advanced services technology. Catena attested to the fact that these disincentives are not mere posturing by the ILECs – investment in Catena’s technology, which can provide DSL service to customers in rural and suburban areas served by certain legacy remote terminals, has not expanded as quickly as it could, notwithstanding its proven economic and technical capabilities.

The Commission is attempting to develop a rational, coherent broadband policy through a series of interrelated proceedings, including this one. Catena urged the Commission to complete these proceedings as rapidly as possible, and in a manner that eliminates the carriers’ disincentives for investment in broadband capabilities and fosters facilities-based competition. In addition, in its initial comments Catena urged the Commission to address even more quickly some of the discrete remote terminal issues that are already ripe for resolution. Finally, Catena argued that the Commission must ensure that the comprehensive broadband policies adopted in these interrelated proceedings apply uniformly across all platforms and across all of the states. If it fails to do so, uncertainty and investment disincentives are likely to be re-introduced on a state-by-state basis. Catena believes that the record in this proceeding and the Court of Appeals remand decision both fully support the policies advocated in Catena’s initial comments.

The Commission’s decision in this and the other interrelated proceedings is likely to have a profound effect on the deployment of broadband services, and hence the U.S. economy. The critical importance of this matter is reflected in the extensive record developed in this proceeding. Over eighty parties filed initial comments, and over one

hundred *ex parte* meetings have already taken place. While the ILECs and the competitive LECs who seek access to UNEs for broadband services at TELRIC prices (and who in some cases are also broadband competitors via cable modem service) are, not surprisingly, divided on the unbundling obligations that should be imposed, the manufacturing sector is united in its call for eliminating disincentives for investment in new broadband technologies.<sup>2</sup> The anecdotal stories by manufacturers such as Catena of the dampening effect on new investment in broadband technology as a result of the specter of unbundling was also reinforced by econometric studies.<sup>3</sup> The bottom line is that the Commission must act promptly to eliminate the current disincentives and uncertainty that is hampering broadband deployment.

## **I. THE COMMISSION SHOULD REJECT LINE CARD COLLOCATION**

In its initial comments, Catena urged the Commission to resolve the discrete remote terminal issues that have been outstanding for several years, even before it

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<sup>2</sup> See generally, Comments of High Tech Broadband Coalition; Comments of Alcatel USA, Inc.; Comments of Corning, Inc.; Comments of Next Level Communications. Of particular note, the High Tech Broadband Coalition includes six different manufacturing trade association representing over 15,000 companies, including not only companies that manufacture telecommunications equipment (and thus stand to benefit directly from deployment of new broadband telecommunications capabilities), but also manufacturers that will benefit from growth in broadband services (such as semiconductor suppliers) and companies that will benefit from greater access to broadband services that will enhance their productivity (as reflected in the National Association of Manufacturers' support).

<sup>3</sup> See Cambridge Strategic Management Group, "Assessing the Impact of Regulation on Deployment of Fiber to the Home," April 5, 2002 (submitted by Corning, Inc.), and Strategic Policy Research, "The Disincentives for Broadband Deployment Afforded by the FCC's Unbundling Policies," April 22, 2002 (submitted by the High Tech Broadband Coalition).

completed the comprehensive, interrelated proceedings. One of those discrete remote terminal issues involves the suggestion to allow competitive LECs to collocate line cards in remote terminals owned by the ILECs, raised previously in the Commission's earlier proceedings in August 2000 (Further NPRM on collocation)<sup>4</sup> and January 2001 (Third Further NPRM on collocation in remote terminals).<sup>5</sup> The initial comments filed in this proceeding confirm that such a requirement is a terrible idea. Perhaps not surprisingly, there has been virtually no call for line card collocation in this proceeding.<sup>6</sup>

Among the competitive LEC commenters, Covad included no renewed call for line card collocation. Indeed, in seeking to argue that remote terminal collocation for competitive LECs was too expensive, Covad attached the testimony of Georgeanne Weidenbach, a Qwest employee, before the Minnesota Public Utilities Commission.<sup>7</sup> As

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<sup>4</sup> *Deployment of Wireline Services Offering Advanced Telecommunication Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, FCC 00-297 (rel. Aug. 10, 2000) at ¶ 82.

<sup>5</sup> *Deployment of Wireline Services Offering Advanced Telecommunication Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, 16 FCC Rcd 2101 (rel. Jan. 19, 2001) at ¶ 56.

<sup>6</sup> This is akin to the dog that did not bark:

Inspector Gregory:

"Is there any other point to which you would wish to draw my attention?"

Holmes: "To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

From *"The Adventure of Silver Blaze"* by Arthur Conan Doyle.

<sup>7</sup> See Covad Comments, Exhibit A to Covad Joint Declaration in CC Docket Nos. 01-338, 96-98 and 98-147 (April 5, 2002).



Ms. Weidenbach testified, line card collocation (or card at a time placement) creates numerous technical, practical, network reliability, network efficiency and operational problems. Thus, Covad's own submission in this proceeding reinforces the point that line card collocation would be an unsupportable and unsustainable policy.

Another competitive LEC, IP Communications, attached to its comments in this proceeding its previously filed comments from other proceedings in which it sought the right to collocate line cards in remote terminals "to install equipment upgrades necessary to support line sharing when the incumbent refuses to do so."<sup>8</sup> In its comments in this triennial UNE review,<sup>9</sup> however, IP Communications made no mention of line cards, nor did it make any attempt in this proceeding to refute the showings submitted by manufacturers and carriers in those earlier proceedings that line card collocation was impractical and unwise.

Two state regulatory commissions in their comments in this proceeding made brief reference to line card collocation. The California Public Utilities Commission mentioned that it is examining the issue of unbundling next generation digital loop carrier ("NGDLC") to allow competitors to install compatible cards with functionality that differs from the ILEC's.<sup>10</sup> As a result of the pendency of that proceeding, the California PUC offered no comments in this rulemaking on the line card collocation issue.

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<sup>8</sup> Comments of IP Communications Corporation in CC Docket Nos. 98-147 and 96-98 (February 27, 2001) at p. 3.

<sup>9</sup> Letter from Howard J. Siegal to Ms. Magalie Roman Salas, April 5, 2002.

<sup>10</sup> California PUC Comments at pp. 3-4.

The New York State Department of Public Service (“New York DPS”) also briefly mentioned the issue of line card collocation. The New York DPS indicated that in its proceeding addressing competitive LEC access to ILEC facilities for the provision of DSL in NGDLC systems, one of the options available to Verizon was to allow line card collocation and the provision of transport.<sup>11</sup> This option depends on the technical feasibility of such collocation, however, and neither the New York DPS comments in this proceeding or the underlying decision address the myriad technical problems with line card collocation.

In its initial comments in this proceeding, WorldCom, Inc. tersely requested that the Commission should require the unbundling of full NGDLC functionality, “including DSLAM line cards at the remote terminal.”<sup>12</sup> Although it is not clear what WorldCom is seeking through its cryptic reference to unbundling NGDLC functionality, including line cards, a later *ex parte* submission by WorldCom suggests that it wants to be able to provide -- using the ILECs’ networks -- broadband services not offered by the ILECs, such as higher transmission speeds and constant or variable bit rates.<sup>13</sup> Thus, WorldCom

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<sup>11</sup> Comments of New York DPS (April 4, 2002) at p. 7. The underlying New York DPS decision provided several options for CLEC provision of DSL from NGDLC systems, including migrating customers to all copper loops, collocation of line cards (as it becomes technically feasible) and making a wholesale broadband service available to competitors. Opinion No. 00-12, Case 00-C-0127 (October 31, 2001) at p. 26. There is some ambiguity as to the line card collocation option insofar as the New York DPS some times refers to this as “virtual” collocation.

<sup>12</sup> WorldCom, Inc. Comments (April 4, 2002) at p. 101, 106 and 115.

<sup>13</sup> WorldCom, Inc. Ex Parte Submission (June 18, 2002) at pp. 9-10.

appears to be seeking the ability to collocate its own line cards.<sup>14</sup> WorldCom's comments did not, however, address the myriad operational, technical and other problems with line card collocation that others have raised in the Commission's earlier proceedings.

As opposed to WorldCom's apparent desire for line card unbundling and/or collocation, AT&T is seeking unbundled access to a unified loop element for broadband access to subscribers served by NGDLC systems. AT&T indicated in its recent Reply Comments in CC Docket No. 02-33: "As AT&T has explained in the Triennial UNE Review proceeding, loops employing NGDLC technology can be unbundled without the need for line card collocation at RTs."<sup>15</sup> Thus, even between the largest competitive LECs there is disagreement on the need for line card collocation.

The absence of any broad (or well-supported) clamoring for line card collocation by the competitive LECs must be contrasted with the renewed and expanded arguments raised in this proceeding by the opponents of line card collocation. In its initial comments, Catena urged the Commission expeditiously to reject calls for line card collocation, and cited to its earlier comments in CC Docket No. 98-147. In those February 27, 2001 Comments, Catena described the complications that would result from

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<sup>14</sup> Alternatively, it may be that WorldCom is seeking the right to specify the types of line cards that the ILECs would be required to purchase and install, which WorldCom would then access as a UNE. WorldCom's *ex parte* summary was not clear whether it is seeking to inject itself into the ILECs' network design practices in this manner.

<sup>15</sup> AT&T Reply Comments in CC Docket No. 02-33 (July 1, 2002) at p. 40, citing its April 5, 2002 Comments in this proceeding at pp. 163-203.

even a “virtual” line card collocation requirement.<sup>16</sup> Advanced services line cards typically serve multiple customers with both voice and DSL services, and the line cards are just one component of the system. In Catena’s CNX-5 system, the broadband services also rely upon a common control card (which also provides testing function), common backhaul capacity, and the shared cabinet, power and backplane capabilities of the remote terminal. All of which greatly complicate cost allocation and network reliability issues that would arise from “simply” unbundling or mandating collocation of line cards.

Other commenters in this proceeding pointed out the myriad difficulties that would be created by line card collocation. Alcatel in its initial comments explained why the introduction of line card collocation, particularly if it involves line cards not produced by the remote terminal manufacturer, would be bad policy.<sup>17</sup> In order to accommodate such collocation, the remote terminals would have to be completely redesigned, thus imposing significant cost and hampering further innovation. Moreover, Alcatel explains why such collocation would be inconsistent with the statute, since line cards are components of telecommunications equipment, not network elements themselves, and the practical difficulties of such collocation means access to those components would not be “at any technically feasible point.”<sup>18</sup> In addition, given the proprietary nature of line cards, the higher “necessary” standard must be met, which is not the case for line card

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<sup>16</sup> Comments of Catena Networks in CC Docket No. 98-147 (February 27, 2001) at pp. 12-14.

<sup>17</sup> Comments of Alcatel (April 5, 2002) at pp. 25-30.

<sup>18</sup> 47 U.S.C. § 251(c)(3).

unbundling.<sup>19</sup> Finally, Alcatel also points out that the Commission should preempt any inconsistent state requirements for line card unbundling and/or collocation, in light of the numerous problems and the disincentives for ILEC investment in new broadband technologies that would result from such requirements.

SBC also explained in its initial comments why unbundling line cards would be contrary to the statute and the public interest.<sup>20</sup> Such unbundling imposes both significant direct costs and considerable network design and management costs, including inefficiency and premature exhaustion of capacity. SBC also objects to the competitive LECs attempts to “free ride” on SBC’s investment in new broadband technologies to the detriment of facilities-based competition.<sup>21</sup> As a result of these numerous problems, SBC has scaled back its Project Pronto deployment because States have adopted such unbundling obligations or threaten to do so.<sup>22</sup>

Verizon incorporated by reference its earlier pleadings opposing unbundling of broadband facilities such as line cards.<sup>23</sup> Verizon also reiterated in its initial comments in this proceeding why line card collocation should not be adopted.<sup>24</sup> Verizon pointed to the

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<sup>19</sup> Alcatel Comments at p. 29. Alcatel also argues that the lower “impair” standard is not met either.

<sup>20</sup> SBC Communications Comments (April 5, 2002) at pp. 52-54, 62-63 and Attachment C.

<sup>21</sup> SBC Communications Comments at p. 54.

<sup>22</sup> SBC Communications Comments at p. 63. *See also* High Tech Broadband Coalition Comments (April 5, 2002) at p. 32 (uncertainty surrounding remote terminal unbundling has caused Verizon to constrain its deployment of DSL capability in RTs).

<sup>23</sup> Verizon Comments (April 5, 2002) at p. 81.

<sup>24</sup> Verizon Comments at pp. 92-94.

absence of technical feasibility for such unbundling/collocation. Finally, Verizon observed that requiring collocation of line cards would be highly inefficient and would needlessly increase the costs for both competitive LECs and the ILECs' customers. In sum, the record in this proceeding fully supports Catena's call for the Commission to reject line card collocation.

## **II. THE COMMISSION SHOULD ACT EXPEDITIOUSLY TO ADDRESS THE DISCRETE REMOTE TERMINAL ISSUES**

The most recent comments in this proceeding confirm that the Commission should reject the earlier suggestion of requiring line card collocation. Moreover, Catena continues to urge the Commission to expedite action on the discrete remote terminal issues, including line card collocation. These issues can and should be addressed even before completion of the comprehensive interrelated rulemaking proceedings. Even AT&T acknowledges that these issues are ripe for resolution, having previously been addressed at length in the Commission's predecessor proceedings.<sup>25</sup>

One of the problems facing the ILECs and competitive LECs alike is the current uncertainty with regard to remote terminal issues. Because the Commission has not yet addressed these issues, several States have addressed or initiated proceedings to address these issues. The resulting patchwork of inconsistent policies has dampened investment in broadband deployment to customers served by remote terminals. In its comments, SBC indicated that adverse decisions by State regulatory commissions with regard to remote terminal issues has led SBC to curtail its Project Pronto broadband deployment.<sup>26</sup>

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<sup>25</sup> AT&T Comments at pp. 163-164 and 172.

<sup>26</sup> SBC Comments at pp. 62-63.

Indeed, AT&T – a competitive LEC and cable modem provider -- acknowledges the need for a uniform national policy.<sup>27</sup>

An early decision by the Commission with regard to these remote terminal issues that makes clear that uniform national policies are essential for encouraging widespread deployment of broadband should put a halt to the patchwork of state decisions that is otherwise threatening to grow. The Commission should thereby expeditiously make clear that it will use its preemption authority to prevent the States from filling the current void in broadband policy – a vacuum that has been exacerbated by the uncertainty triggered by the Court of Appeals remand of the Commission’s unbundling decision and vacatur of the line sharing order. While the Commission’s comprehensive and interrelated proceedings should eventually result in coherent nationwide broadband policies, continuing actions by State regulators are already slowing broadband deployment as a result of the patchwork -- and could have an even more deleterious effect unless and until national policies are established.

### **III. THE RECORD MAKES CLEAR THAT THE COMMISSION MUST ELIMINATE DISINCENTIVES TO INVESTMENT IN NEW BROADBAND TECHNOLOGIES**

In its initial comments in this proceeding, Catena related its experiences with regard to the deployment of broadband technologies. Catena had observed the dampening effect on broadband deployment in remote terminals caused by the current uncertainty over regulatory policies and the threat of unbundling at TELRIC prices.

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<sup>27</sup> AT&T Comments at pp. 169-70 (“Without the expedited establishment of a uniform national baseline for unbundled access to ILECs’ ‘unified’ loops, CLECs will be forced to contend with a patchwork of state-by-state regulation.”)

Other commenting parties had similar experiences. The High Tech Broadband Coalition explained that requiring ILECs to share the rewards of investment in new broadband technology with competitors who bear none of the risks reduces the ILECs' expected return on investment and thus creates disincentives to new investment.<sup>28</sup> The High Tech Broadband Coalition included an analysis by John Haring and Jeffrey Rohlfs of Strategic Policy Research that concluded, based on modeling and economic theory of "real option effects," that the truncation of the upside potential of DSL eliminates the justification of mass market deployment of this broadband technology.

Alcatel also commented on the disincentives to new investment in broadband technologies as a result of the unbundling obligations of the ILECs.<sup>29</sup> Alcatel has had similar experiences to Catena, with a significant slow down in deployment as a result of the Commission's unbundling policies. Other manufacturers submitted comments relaying their perception of the marketplace impact of unbundling. Next Level Communications has experienced dampening of demand for its broadband platform as a result of the Commission's regulatory regime.<sup>30</sup>

Corning, Inc. ("Corning") focuses its comments on the adverse effects of the unbundling and pricing obligations on one specific mode of broadband deployment – fiber-to-the-home. Corning contrasted SBC's experience in Illinois, where state imposed unbundling requirements put a stop to new investment, with unregulated competitive

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<sup>28</sup> High Tech Broadband Coalition Comments at pp. 28-32.

<sup>29</sup> Alcatel Comments at pp. 9-11.

<sup>30</sup> Comments of Next Level Communications (April 5, 2002) at pp. 8-14.



LEC deployment of fiber-to-the-home technology.<sup>31</sup> Corning also included in its comments a detailed study prepared by Cambridge Strategic Management Group (“CSMG”) that sought to quantify the effect of these regulatory disincentives. CSMG modeled actual investment and expense along with estimated revenue data, and concluded that the unbundling and TELRIC pricing regime would eliminate approximately 84 percent of the ILEC fiber-to-the-home overbuilds that would otherwise occur in the absence of such regulatory obligations.

The unanimous experiences of the manufacturers, supported by economic studies, dispel any notion that the ILECs are merely “crying wolf” in order to eliminate some “pesky” regulations.<sup>32</sup> The record in this proceeding makes abundantly clear that unbundling and TELRIC pricing are significantly retarding investment in new broadband technologies, to the detriment of facilities-based competition and the U.S. economy. The manufacturers have proposed as a solution to this problem the elimination of unbundling obligations on new, last-mile broadband facilities – specifically, fiber, remote terminals, and DSL (and successor) electronics deployed on the customer side of the central office used to provide broadband services.<sup>33</sup>

In its initial comments in this proceeding, Catena had expressed some concern with regard to the *Notice*’s proposal to distinguish between existing facilities and new

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<sup>31</sup> Corning, Inc. Comments (April 5, 2002) at pp. 3-4.

<sup>32</sup> Even Covad seemingly acknowledges these disincentives, although Covad suggests that the Commission should modify the TELRIC pricing scheme rather than eliminating the unbundling obligation. Covad Comments at p. 63.

<sup>33</sup> High Tech Broadband Coalition Comments at p. 4.

construction in determining unbundling obligations.<sup>34</sup> Catena did not want the Commission inadvertently to disfavor particular technologies, such as Catena's, that enhance the capabilities of the embedded facilities rather than replacing them altogether. Catena believes, however, that if the Commission adopts the definitions of "new last mile facilities" proffered by the High Tech Broadband Coalition, that it will avoid that potential problem. Catena believes it is important for the Commission to eliminate disincentives to investment in new broadband facilities, and that the High Tech Broadband Coalition presents a straightforward method for doing so.

Such a policy will well serve the public interest by fostering widespread deployment of broadband services, consistent with Congress' directives in Section 706 of the Telecommunications Act of 1996. Not imposing unbundling and TELRIC prices on new, last mile facilities will also encourage facilities based competition. At the same time, because these are new investments there can be no claim that any such newly-deployed facilities are a vestige of the former government-sanctioned monopoly paid for by "captive ratepayers." Catena thus fully supports the High Tech Broadband Coalition's call for not burdening new investment with the regulatory obligations of Section 251's unbundling requirements.

#### **IV. THE COURT OF APPEALS REMAND DECISION MERELY REINFORCES THE NEED FOR THE COMMISSION TO REVISIT THE UNBUNDLING REQUIREMENTS FOR NEW BROADBAND INVESTMENT**

The Commission extended the reply comment deadline in this proceeding in order to permit commenters to incorporate an assessment of the impact on this proceeding of

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<sup>34</sup> Catena Comments at p. 12, citing the *Notice* at ¶ 50.

the *USTA v. FCC* decision.<sup>35</sup> Catena believes that the Court of Appeals decision merely reinforces the need for the Commission to eliminate the unbundling and TELRIC policies with regard to investment in new broadband technologies. The Court's decision does not require the Commission to veer away from the path it has already seemingly selected when it initiated the interrelated proceedings designed to develop a holistic broadband regulatory policy that would apply across platforms.

In its decision, the Court of Appeals did not remand the Commission's unbundling decision because it disagreed with the Commission's policy choices (contrary to *Chevron* deference). Rather, the Court found that the Commission had not adequately justified its decisions because it had not taken into account relevant factors (such as intermodal competition), or because the Commission had merely mouthed broad platitudes (such as "unbundling is good") without actually assessing whether the "competition" it was creating was entirely artificial. However, even before the Court issued its decision, the Commission in this proceeding had already committed to reexamining its unbundling rules, taking into account the factors identified by the Court of Appeals. The Commission was already looking at the granularity of the unbundling rules to determine whether market specific conditions should affect unbundling. The Commission was also examining the extent to which the unbundling rules discouraged facilities based competition and the impact of intermodal competition on the "impairment" analysis.<sup>36</sup> Thus, the bottom line is that the Court of Appeals decision

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<sup>35</sup> *Public Notice*, DA 02-1284, released May 29, 2002.

<sup>36</sup> Although the Commission had not specifically indicated that its "impairment" analysis would consider whether the market was already subsidized (*e.g.*, rural by urban,

simply requires the Commission to undertake an analysis of the factors it was already considering.

Nor is there any inconsistency between the Court of Appeals decision and the Supreme Court's decision upholding the Commission's selection of the TELRIC costing model for unbundled elements. The Supreme Court held that the Commission's decision to select TELRIC was within its discretion. The Court of Appeals merely elaborated that, having decided to select TELRIC pricing, the Commission should take into account the ramifications for such a choice on competition and hence unbundling. The Court of Appeals held that the decision to utilize TELRIC and the reexamination of the unbundling rules are interrelated – in essence the Commission's determination of the public interest (and interpretation of the 1996 Act) is a multiple variable equation.

## **V. CONCLUSION**

In its initial comments in this proceeding, Catena urged the Commission to act quickly to resolve the outstanding rulemaking proceedings to develop a cohesive broadband policy that does not create disincentives (such as unworkable access and pricing) for investment in new broadband technologies. Catena also urged the Commission to act even faster to resolve discrete remote terminal collocation issues that are fully ripe for decision so as to remove any potential impediments to the deployment of integrated broadband technology. Finally, Catena urged the Commission not to allow inconsistent state regulatory decisions to frustrate the critical federal policy of fostering

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residential by business), such an analysis should be subsumed in a thorough assessment of the competitiveness of the market (which the Commission was already undertaking).

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